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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KYLE LAMONT WRIGHT, Defendant and Appellant.	B158622 (Los Angeles County Super. Ct. No. BA214420)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin and Alice E. Altoon, Judges. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Michelle J. Pirozzi, Deputy Attorneys General, for Plaintiff and Respondent.

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Kyle Lamont Wright appeals from the judgment entered following jury trials resulting in his convictions of misdemeanor battery and making a criminal threat. (Pen. Code, §§ 242, 422.) The trial court sentenced him to an aggregate term of three years in state prison. He makes the following two contentions: (1) during closing argument in his first trial, he was denied due process as the prosecutor referred to evidence outside the record; and (2) the trial court erred by charging the jury with CALJIC No. 17.41.1.

We reject the contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

1. Introduction

Appellant was charged in count 1 of the information with assault by means of force likely to produce great bodily injury and with a deadly weapon. In count 2 of the information, he was charged with making a criminal threat. Appellant had two trials. During the first trial, the jury deadlocked on the assault charge in count 1, but it returned a guilty verdict as to the criminal threat charge in count 2. The trial court declared a mistrial. In the second trial, the jury acquitted appellant of the count 1 assault and returned a verdict of guilty to a lesser included offense of misdemeanor battery. Because appellant challenges one of the prosecutor's closing remarks in the first trial, we take our summary of the trial evidence from appellant's first trial.

2. Trial Evidence

A. People's Case-in-chief

Viewed in accordance with the usual rules on appeal (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11-12), the evidence established that on February 23, 2001, John Fogen worked for the Los Angeles County Department of Water and Power (DWP). He drove a DWP truck to a triplex located on West Adams Boulevard, parked out front, and walked through the alley to the meter in the triplex's rear yard. Fogen was investigating a possible theft of electricity by the occupant in unit No. 1 of the triplex. DWP previously had turned off power to that unit, and Fogen discovered that service had been restored. Fogen again shut off the unit's power and locked the meter. Fogen was wearing the DWP uniform, a pair of

gray chinos and a blue shirt, and he had a DWP identification hanging around his neck, a tool belt and a camera.

As Fogen turned to leave the yard, appellant emerged from the downstairs unit and confronted him. Appellant angrily demanded to know what Fogen was doing in the yard. Fogen replied that he was a DWP employee. Appellant blocked Fogen's path to the gate into the alley and shoved Fogen several times on the chest with both hands. Appellant repeatedly yelled, "I'm going to f------ kill you."

Fogen pleaded with appellant, "Please don't do this." Appellant shut the alley gate and pushed Fogen again. Another man came outside. Fogen used DWP-issued dog repellent to spray appellant and ran into the alley. Fogen heard appellant say to the other man, "I'm going to f------ kill this guy." Both men entered the alley. Fogen was walking backwards away from the men, appellant's companion lunged at Fogen, Fogen bumped into something behind him, and "everything went black." Fogen regained consciousness in a bathroom. He was bleeding, and paramedics took him to the Cedars-Sinai Medical Center.

Cornell Kirkland (Kirkland) owned the Saturn Escrow, the business next door to the triplex. He testified that appellant lived in the triplex's "[d]ownstairs." On February 23, 2001, Kirkland went out his rear door and saw appellant and another man in the alley. They were rubbing their eyes and saying, "You sprayed me." A third man (Fogen) was sitting in the alley with his back against Kirkland's security fence. Kirkland said that Fogen had been beaten up, and he was bleeding from his mouth or nose. Kirkland attempted unsuccessfully to get a response from Fogen. Kirkland's impression was that emotions were "flying real high." Appellant kept saying, "You sprayed me," in an increasingly loud tone of voice. Kirkland told appellant, "[C]ool out," and "[S]top," and went inside and telephoned 911.[1]

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[1] The parties stipulated that it was 45 feet from the property line separating Kirkland's business from the triplex westbound to the mouth of the alley at West View Street. There are four posts at the edge of the alley behind Kirkland's business. They are about a foot from Kirkland's security fence and, east to west, respectively, 10, 10, and 14 feet apart. The parties also stipulated to a diagram showing various measurements in the alley and to the distances stated in People's exhibit No. 3 and in various defense photographs entered into evidence.

Two to 10 minutes later, Kirkland looked outside again. Fogen was on his feet, disoriented, and stumbling incoherently westbound in the alley. Appellant was walking behind Fogen some 10 or 15 feet and saying, "You sprayed me." Appellant's companion was no longer in the alley.

Los Angeles Police Officer Emada Castillo responded to a call of a "possible assault" and saw paramedics taking Fogen to the hospital. Inside the alley gate at 4921 West Adams Boulevard, she found blood, a can of dog repellent, a bloody vest or jacket, an inhaler, and a bottle of prescription drugs bearing Fogen's name. In the alley west of the gate, she found a gold watch and a yellow post with blood on it.

At the hospital, Fogen told Officer Castillo that a man came out of the triplex and said: "Get the f--- out of my driveway," and "What the f--- are you doing here." Fogen backed away. The man punched him in the face several times. Another man came out of triplex, and he also punched Fogen repeatedly in the face and head. Fogen sprayed the men with the dog repellent. Fogen said that he believed that he had been knocked unconscious because he could not remember what had happened after the men hit him.[2] Fogen described his assailant as an African-American with a medium to dark complexion and black hair, whereas in trial court the officer agreed that appellant had a light complexion and a lot of gray in his hair.

Fogen had scratches and bruises, a broken nose, a puncture wound in his nose, a laceration on his ear, a cut on the back of his head, and abrasions on his right knee.

On March 1, 2001, Detective Richard Record knocked on the door to the two units in the downstairs portion of the triplex. Appellant answered the door and said that he lived there. On March 4, 2001, Detective Record showed Fogen a six-pack photographic display

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[2] In his trial testimony, Fogen explained that in the emergency room, he told Officer Carillo the truth about the incident. However, he did not recall telling the officer that appellant and the other man assaulted him. He recalled the other man lunging at him and that he used the dog repellent because he was in fear of his life. He believed that he sprayed only appellant and that he used the repellent only in the triplex's rear yard. But he was not certain about whether he also sprayed the other man and whether he used the repellent in the alley.

containing appellant's photograph. Fogen identified appellant as his assailant. Fogen also identified appellant at trial and at the preliminary hearing.

B. Defense

In defense, the emergency room nurse testified that at 3:00 p.m. when Fogen first arrived at the hospital, he was not oriented as to time and place. He recalled being attacked, but nothing more. She had noted that he was awake and alert at 5:35 p.m. and 6:20 p.m. and that a police officer was with him at 6:00 p.m.

The parties stipulated that the attending physician at the hospital, Dr. Paul Silka, would testify that upon arrival, Fogen was oriented as to person, time, place, and worldly events. The doctor opined that Fogen may well have suffered a concussion from blunt force trauma, that a concussion was consistent with both the infliction of blunt force trauma and a fall, and that a concussion can influence memory.

During the March 4, 2001 interview, Fogen told Detective Record the same version of events that he testified to at trial. Fogen also told Detective Record that he assumed that he had tripped when he was backing up because he had no recollection of what occurred afterward.

During final argument, counsel argued mistaken identification.

DISCUSSION

1. Prosecutorial Misconduct

Appellant contends that the prosecutor committed prosecutorial misconduct that was so egregious that it denied him due process, and he is thus entitled to a reversal. We reject the contention.

A. Pertinent Facts

Appellant complains about the following italicized remark that the prosecutor made during final argument. "[The prosecutor:] I would like you to listen to the defenses on the case. What the defense is saying is that our victim is probably wrong about the I.D. And I want you to think about how illogical that argument is, even after the victim identified him in a six-pack, even after the victim identified him at the preliminary hearing, even after the victim identified him here in court, even after Mr. Kirkland came in and said, Look, that's

my neighbor, *I saw him standing over the victim*, emotions were running high, and Mr. Kirkland -- [¶] [By counsel:] Objection. Misstates the evidence. [¶] THE COURT: You heard the evidence. Rely on your recollection. [¶] [By the prosecutor:] After Mr. Kirkland saw him standing over the victim -- [¶] [By counsel:] Same objection. [¶] THE COURT: I've already addressed that. [¶] Please continue." (Emphasis added.)

B. Applicable Law

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.] [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427, quoting from *People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [stating the federal standard].)

It is prosecutorial misconduct to refer to facts not in evidence because "such statements 'tend[] to make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."'" (*People v. Hill* (1998) 17 Cal.4th 800, 828.) However, "'"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'"'" (*Id.* at p. 819.)

C. Analysis

Appellant argues that Kirkland's testimony provides an insufficient basis from which the prosecutor might argue to the jury that appellant was "standing over" Fogen in the alley. He claims that the remark is an improper reference to facts outside the record and constitutes a misstatement of fact that so "infected the trial" with "unfairness that [he] was denied federal due process."

The prosecutor's remark constituted fair comment on the evidence. The argument was in response to a defense claim of mistaken identification. (*United States v. Young* (1985) 470 U.S. 1, 11-13 [a prosecutor's comments should be examined in the context of the trial, and questions raised by defense counsel on the same subject weigh heavily on the effect the complained-of comments had on the jury's ability to judge the evidence].) Kirkland testified that when he initially looked outside, he observed Fogen sitting dazed on the ground in the alley and that appellant was standing near him. Kirkland's testimony provides a reasonable basis for the argument that the victim's and appellant's positions vis-à-vis one another in the alley constituted circumstantial evidence that appellant was the assailant. Whether the prosecutor's inference was reasonable was for the jury to decide. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Also, upon the defense objection that the remark misstated the evidence, the trial court reminded the jury that whether or not the prosecutor's argument reflected the evidence was a factual issue for the jury to decide. Also, in deciding that factual issue, the jury should rely upon its recollection of the trial evidence. The prosecutor's remark did not distort the evidence and thus unfairly strengthen the prosecution case, and there is no likelihood that the prosecutor's remarks would have confused or misled the jury. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Furthermore, the comment did not show that the prosecutor engaged in a pattern of conduct so egregious that it infected the trial with unfairness. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

Appellant cites two cases in support of his contention.

Miller v. Pate (1967) 386 U.S. 1 involved a murder conviction. There, the prosecutor knowingly introduced critical evidence that blood matching the child victim's blood type

was found on a pair of shorts inferentially belonging to the defendant. The prosecutor also argued in his final comments to the jury that the defendant had discarded the pair of shorts that was stained with the victim's blood. The prosecutor and the trial court blocked efforts by the defense to conduct forensic testing on the shorts. The *Miller* court reversed the defendant's conviction as the prosecutor had knowingly secured the defendant's conviction with false evidence. (*Id.* at pp. 4-7.)

In *United States v. Blakey* (11th Cir. 1994) 14 F.3d 1557, the court ordered a reversal where the prosecutor in his final argument to the jury called the defendant a "professional criminal" without having introduced any evidence of the defendant's criminal record at trial to support the claim. The *Blakey* court commented that the prosecutor's remark was improper as it went outside of the evidence and impugned the defendant's character with an inaccurate characterization. (*Id*. at p. 1560.)

The facts in these cases are not analogous to what is presented here, and they do not support appellant's contention.

2. CALJIC No. 17.41.1

Appellant asserts that CALJIC No. 17.41.1 violates the federal Constitution for the following reasons: (1) the instruction requires the jurors to "'snitch'" on one another; (2) it compromises the private and uninhibited nature of jury deliberations; (3) it encourages the majority to impose its will upon a "hold-out" juror, violating appellant's right to have 12 individual jurors decide his case. He makes further claims that CALJIC No. 17.41.1 violates the jurors' state and federal rights to freedom and association (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 1, 2), and the instruction violates his rights to due process, a jury trial, and a unanimous verdict.

During both trials, the trial court charged the jury at the close of evidence with CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based upon penalty or punishment, or any other

improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

Appellant recognizes that the recent California Supreme Court decision in *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*), addressed the same contentions and determined that the instruction was constitutional. (*Id*. at p. 444.) Appellant argues, however, that because his case involved evenly balanced or weak identification evidence, giving the instruction was error, and because the error is prejudicial, he is entitled to a reversal. Appellant's argument is flawed. The relative strengths of the prosecution and defense evidence is not what determines if there is error under *Engelman*. *Engelman* rejected the same issues that appellant raises in this appeal after examining the constitutional principles involved, and we are bound by the resolution of those issues in *Engelman*. (*Auto Equity Sales, Inc*. *v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In the first trial, there was no evidence that the jury had any difficulty determining appellant's guilt or innocence as to the criminal threat offense. During the second trial, the only inquiry that the jury had for the trial court was with regard to the procedure to be followed in finding guilt of a lesser included offense. Thus, there is no indication in the record that one or more of the jurors ever refused "to follow the court's instructions or [refused] to deliberate." (*Engleman,* 28 Cal.4th at p. 445.) Accordingly, we must affirm the judgment.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P.J.
BOREN

_____, J
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